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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**TRADER JOE'S COMPANY, a
California corporation,**

Plaintiff,

V.

TRADE JOE'S UNITED.

Defendant.

Case No. 2:23-cv-05664

**PLAINTIFF TRADER JOE'S
COMPANY'S OPPOSITION TO
MOTION TO DISMISS, REQUEST
FOR JUDICIAL NOTICE, AND
NOTICE OF SUPPLEMENTAL
AUTHORITY**

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1 Plaintiff Trader Joe's Company ("Trader Joe's") submits this opposition to
 2 Defendant Trader Joe's United's ("Defendant") Motion to Dismiss the Complaint,
 3 Request for Judicial Notice, and Notice of Supplemental Authority.

4 **I. INTRODUCTION**

5 This case concerns a narrow and straightforward application of trademark
 6 and related law to the sale of goods bearing infringing marks and stylizations. It
 7 does not concern Defendant's ability to use the mark TRADER JOE'S to refer to
 8 the union or its organizing efforts. And it does not concern all merchandise sold by
 9 Defendants. Indeed, Trader Joe's has disclaimed seeking any such remedies.
 10 Rather, Trader Joe's seeks remedies solely for the sale of certain goods that make
 11 use of Trader Joe's trademarks and stylizations that are likely to confuse
 12 consumers. Put simply, this is a case about commerce, not about any labor dispute.

13 Defendant's motion first argues that Trader Joe's has failed to plead selected
 14 elements of certain claims. But, as discussed below, Trader Joe's has sufficiently
 15 pled each required element. Defendant then argues that the Norris-LaGuardia Act
 16 precludes the injunctive relief sought by Trader Joe's. But this argument is
 17 misplaced, because this lawsuit is not a "labor dispute" within the meaning of that
 18 Act. In a purely commercial case, as present here, a union's trademark infringement
 19 justifies relief pursuant to the Lanham Act. The motion should be denied.

20 **II. FACTUAL BACKGROUND**

21 Trader Joe's has continuously used for the last 56 years its distinctive
 22 TRADER JOE'S name and trademarks (the "TRADER JOE'S Family of Marks")
 23 on its TRADER JOE'S-branded products. Compl. ¶ 19. During that time, Trader
 24 Joe's has achieved great business success, such that the TRADER JOE'S Family of
 25 Marks symbolizes extraordinary goodwill. *Id.* ¶ 23. The TRADER JOE'S mark also
 26 has achieved fame throughout the United States. *Id.* Products bearing the TRADER
 27 JOE'S Family of Marks are sold exclusively by Trader Joe's, because Trader Joe's
 28 does not franchise or license the TRADER JOE'S Family of Marks. *Id.* ¶ 25.

1 Defendant is now wrongfully, and without authorization, using the TRADER
 2 JOE'S Family of Marks on certain merchandise it markets and sells online to the
 3 general public. *Id.* ¶¶ 26-31. The infringing merchandise, including reusable tote
 4 bags, apparel, and home goods, contains branding that incorporates the unique
 5 attributes of the TRADER JOE'S Family of Marks. *Id.* ¶¶ 4, 28-29. Defendant's use
 6 of the TRADER JOE'S Family of Marks on these products is likely to cause
 7 confusion among consumers. *Id.* ¶ 40. But as the Complaint makes abundantly
 8 clear, Trader Joe's does not allege that *all* of Defendant's merchandise is infringing.
 9 *Id.* ¶ 37. Nor does Trader Joe's seek to restrain the use of "Trader Joe's" for the
 10 purpose of identifying the union or discussing the union's cause. *Id.* ¶¶ 35-36. The
 11 case seeks only a limited remedy, contrary to the sweeping claims in the motion to
 12 dismiss.

13 **III. LEGAL STANDARD**

14 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is
 15 disfavored and rarely granted. *Neveu v. City of Fresno*, 392 F. Supp.2d 1159, 1168
 16 (E.D. Cal. 2005). To survive a motion, Trader Joe's' complaint need only "contain
 17 sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible
 18 on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
 19 *Twombly*, 550 U.S. 544, 570 (2007)). "[S]pecific facts are not necessary" so long as
 20 the "complaint gives the defendant fair notice of the claim and the grounds upon
 21 which the claim rests." *Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.*, 998 F.
 22 Supp. 2d 890, 896 (C.D. Cal. 2014). As the Court explained in *Twombly*, "asking
 23 for plausible grounds does not impose a probability requirement at the pleading
 24 stage; it simply calls for enough fact to raise a reasonable expectation that discovery
 25 will reveal evidence of" unlawful conduct. *Twombly*, 550 U.S. at 545. In
 26 conducting this evaluation, courts "must presume all factual allegations of the
 27 complaint to be true and draw all reasonable inferences in favor of the non-moving
 28 party." *Kythera*, 998 F. Supp. 2d at 896 (citing *Klarfeld v. United States*, 944 F.2d

1 583, 585 (9th Cir. 1991)).

2 Generally, when evaluating a motion to dismiss, district courts are bound by
 3 the four corners of the pleadings. *Visual Changes Skin Care Int'l, Inc. v. Neways,*
 4 *Inc.*, 2008 WL 4723603, at *3 (E.D. Cal. Oct. 24, 2008). Federal Rule of Evidence
 5 201 provides a narrow exception, allowing a court to take judicial notice of facts
 6 that are “not subject to reasonable dispute.” Fed. R. Evid. 201(b). It is well
 7 established in this Circuit that a court “may take judicial notice of records from
 8 other proceedings not to credit the truth of the allegations or facts set forth therein,
 9 but rather for purposes of noticing the existence of” the dispute. *Acasio v. San*
 10 *Mateo County*, 2015 WL 5568345, at *1 n.1 (N.D. Cal. Sept. 22, 2015).
 11 Consequently, the Court may take judicial notice of the July 7, 2023 and May 25,
 12 2023 consolidated complaints issued by the National Labor Relations Board, as
 13 attached to Defendant’s Motion, but “may not take judicial notice of disputed facts
 14 contained in” those complaints. *Motul S.A. v. USA Wholesale Lubricant, Inc.*, 2023
 15 WL 5061945, at *4 (N.D. Cal. Aug. 8, 2023); *see also Akahoshi v. Bank of Am.,*
 16 *N.A.*, 2015 WL 13917116, at *2 (C.D. Cal. Aug. 5, 2015) (“it would be improper
 17 for the Court to judicially notice reasonably disputed facts, even if those facts are
 18 stated within publicly recorded documents”).

19 **IV. ARGUMENT**

20 Defendant’s Motion and Notice of Supplemental Authority fundamentally
 21 overstate what Trader Joe’s must plead at this juncture. Contrary to Defendant’s
 22 suggestion, Trader Joe’s is not required to allege every element of the eight-factor
 23 test for likelihood of confusion, nor is it required to prove an actual likelihood of
 24 confusion at this stage. *Visual Changes*, 2008 WL 4723603, at *6. The question is
 25 whether Trader Joe’s has stated a claim to relief that is plausible on its face, and
 26 Trader Joe’s has done so. Further, Defendant’s Norris-LaGuardia Act argument is a
 27 red herring. This action is not a labor dispute, and Defendant cannot show
 28 otherwise. Because Trader Joe’s has sufficiently pled its claims under the

1 applicable standards, and the Norris-LaGuardia Act is irrelevant here, this Court
 2 should deny Defendant's Motion.

3 **A. Trader Joe's Has Sufficiently Pled Its Lanham Act, UCL, and**
 4 **Common Law Claims**

5 Trader Joe's has sufficiently pled each of its claims under the Lanham Act,
 6 California Unfair Competition Law ("UCL"), and common law. To state a claim for
 7 trademark infringement under the Lanham Act, Trader Joe's is required to plead
 8 "(1) that it has a protectible ownership interest in the mark; and (2) that
 9 [Defendant's] use of the mark is likely to cause consumer confusion." *Network*
 10 *Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir.
 11 2011). The Ninth Circuit "has consistently held that state common law claims of
 12 unfair competition and actions pursuant to California Business and Professions
 13 Code § 17200 are 'substantially congruent' to claims made under the Lanham Act."
 14 *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994) (internal citations
 15 omitted). Under both the first and second causes of action under the Lanham Act
 16 and the unfair competition claims under state law, "the ultimate test is whether the
 17 public is likely to be deceived or confused by the similarity of the marks."¹ *Acad. of*
 18 *Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446,
 19 1457 (9th Cir. 1991) (citations omitted). To plead a dilution claim, a plaintiff must
 20 allege that "(1) the mark is famous and distinctive; (2) the defendant is making use
 21 of the mark in commerce; (3) the defendant's use began after the mark became
 22 famous; and (4) the defendant's use of the mark is likely to cause dilution by
 23 blurring or dilution by tarnishment." *Upper Deck Co. v. Flores*, 569 F. Supp. 3d
 24 1050, 1065 (S.D. Cal. 2021).

25
 26

 27 ¹ "The tests for infringement of a federally registered mark under [the Lanham Act],
 28 infringement of a common law trademark, unfair competition under [the Lanham
 Act], . . . and common law unfair competition involving trademarks are the same:
 whether confusion is likely." *Grey v. Campbell Soup Co.*, 650 F. Supp. 1166, 1173
 (C.D. Cal. 1986).

1 Defendant makes scattershot attacks on a handful of the elements at issue.
 2 Each of those attacks fails.

3 **1. Trader Joe's Sufficiently Alleged Likelihood of Confusion**

4 Trader Joe's has sufficiently pled likelihood of confusion under both the
 5 *Sleekcraft* test and the "internet troika" factors. *See AMF Inc. v. Sleekcraft Boats*,
 6 599 F.2d 341, 348-49 (9th Cir. 1979), *abrogated on other grounds*; *GoTo.com v.*
 7 *Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000). This conclusion is
 8 particularly obvious in light of in-circuit authority that disfavors motions to dismiss
 9 on likelihood of confusion grounds, because "the likelihood of confusion inquiry is
 10 a fact-intensive evaluation ill-suited for disposition on a motion to dismiss." *Lucent*
 11 *Techs., Inc. v. Johnson*, 2000 WL 1604055, at *2 (C.D. Cal. Sept. 12, 2000). Nor
 12 do the out-of-circuit decision in *Medieval Times* or other cases cited by Defendant
 13 support dismissal.

14 **a. Trader Joe's Adequately Pled Likelihood of Confusion Under**
 15 ***Sleekcraft* and the "Internet Troika"**

16 The "test for likelihood of confusion is whether a reasonably prudent
 17 consumer in the marketplace is likely to be confused as to the origin of the good or
 18 service bearing one of the marks." *Entrepreneur Media, Inc. v. Smith*, 279 F.3d
 19 1135, 1140 (9th Cir. 2002). This analysis is conducted via an eight factor test,
 20 including: (1) the strength of the plaintiff's mark; (2) the proximity or relatedness of
 21 the parties' goods; (3) the marks' similarity in appearance, sound, and meaning; (4)
 22 evidence of actual confusion; (5) evidence of the defendant's intention in selecting
 23 and using the allegedly infringing name; (6) the degree to which the parties'
 24 marketing channels converge; (7) the type of goods and the degree of care
 25 customers are likely to exercise in purchasing them; and (8) the likelihood that the
 26 parties will expand their product lines. *Sleekcraft Boats*, 599 F.2d at 348-49. In the
 27 context of the internet, courts have deemed that the three most important *Sleekcraft*
 28 factors—the internet troika—are (1) the similarity of the marks; (2) the relatedness

1 of the goods or services; and (3) the “simultaneous use of the Web as a marketing
 2 channel.” *GoTo.com*, 202 F.3d at 1205.

3 Trader Joe’s’ 71-paragraph Complaint is replete with factual allegations and
 4 visual examples plausibly stating a likelihood of confusion. Trader Joe’s alleges
 5 numerous facts supporting the strength of its mark (Factor 1), including use of the
 6 TRADER JOE’S Family of Marks since 1967, which has generated “substantial
 7 fame, commercial goodwill, and customer recognition.” Compl. ¶ 20. The
 8 Complaint alleges that both Trader Joe’s and Defendant sell related goods,
 9 including, at a minimum, reusable tote bags (Factor 2). *Id.* ¶¶ 18, 26, 29. Trader
 10 Joe’s illustrates the visual similarities of the infringing marks with the TRADER
 11 JOE’S Family of Marks by including side-by-side comparisons of an infringing
 12 product with Trader Joe’s’ product (Factor 3). *Id.* ¶¶ 21, 28-29.

<u>Trader Joe’s Product</u>	<u>Defendant’s Infringing Product</u>
	

25 Trader Joe’s specifically alleges that Defendant’s infringing products use the
 26 TRADER JOE’S typed word and stylized mark, Trader Joe’s unique red coloring,
 27 typeface, concentric circle designs, and/or a similar general composition to the
 28

1 TRADER JOE'S logo² (Factor 3). *Id.* ¶¶ 5, 27-28. Trader Joe's' complaint alleges
 2 that Defendant's infringing products are available for sale on Defendant's
 3 commercial website, where it markets and sells various products exhibiting the
 4 Trader Joe's trademarks in a way that is likely to cause consumer confusion
 5 because Trader Joe's also markets its products online (Factor 6).³ *Id.* ¶¶ 4, 16, 40.
 6 Customers are unlikely to exercise a high degree of care in purchasing the
 7 infringing products because "reusable tote bags, apparel, mugs, and buttons" are
 8 inherently inexpensive (Factor 7). *Id.* ¶ 26; *Lanard Toys Ltd. v. Anker Play Prods.,*
 9 *LLC*, 2020 WL 6873647, at *14 (C.D. Cal. Nov. 12, 2020) ("Unlike purchasers of
 10 expensive goods—whom we expect to be more discerning and less easily
 11 confused—purchasers of inexpensive goods are likely to exercise less care, thus
 12 making confusion more likely."). Finally, Trader Joe's alleges that "Defendant will
 13 continue and expand" its infringing activity if not enjoined. Compl. ¶ 41 (Factor 8).
 14 The foregoing allegations alone are sufficient to plead likelihood of confusion.

15 Defendant nevertheless argues that "Plaintiff fails to allege critical *Sleekcraft*
 16 factors." Mot. at 7; *see also* Dkt. No. 23 at 2 ("Plaintiff failed to allege any intent
 17 to confuse . . . [and] actual confusion."). But this misapprehends the law. The Ninth
 18 Circuit assesses likelihood of confusion based on "those factors that are of the most
 19 relative importance in any particular case" and, as Defendant argues, "the Ninth
 20

21 ² Defendant's conclusory claim that Trader Joe's' "Complaint shows no similarity
 22 of marks" is demonstrably false. Mot. at 8. In evaluating similarity of two marks,
 23 courts can consider "color of lettering and/or background, font or typeface, and the
 24 overall style or appearance of the marks." *Fierce, Inc. v. Franklin Covey Co.*, 2019
 25 WL 1453573, at *5 (W.D. Wash. Apr. 2, 2019) (internal citations omitted).

26 ³ In its Motion, Defendant claims that the Parties' simultaneous use of the internet
 27 as a marketing channel is "next to nil" because Trader Joe's does not sell its
 28 products online. Mot. at 8-9. Defendant's suggestion that marketing channels
 equate to point of sale is incorrect. Marketing channels can include "the type of
 market (retail or wholesale), point of sale, type of retail establishment, **and methods**
of advertising"). *Playmakers, LLC v. ESPN, Inc.*, 297 F. Supp. 2d 1277, 1283
 (W.D. Wash. 2003) (emphasis added). As Trader Joe's pled, it advertises its
 products on its website, which "receives over 4.6 million visitors monthly."
 Compl. ¶ 16.

1 Circuit places ‘greater import’ on the ‘internet troika.’” *Visual Changes*, 2008 WL
 2 4723603, at *6 (citing *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 632 (9th Cir.
 3 2008)); Mot. at 8. As explained above, Trader Joe’s has pled facts sufficient to
 4 allege all three parts of that troika: the similarity of the marks, the relatedness of the
 5 goods, and use of the internet as a marketing channel by both parties.

6 Contrary to Defendant’s claim, Trader Joe’s need not plead facts regarding
 7 every *Sleekcraft* factor. The *Sleekcraft* test is “pliant” and “it is often possible to
 8 reach a conclusion with respect to likelihood of confusion after considering only a
 9 subset of the factors.” *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d
 10 1036, 1054 (9th Cir. 1999). The absence of allegations regarding actual confusion
 11 and Defendant’s intent does not warrant dismissal as Defendant urges. Courts in
 12 this Circuit have denied motions to dismiss with similar pleading “deficiencies.”
 13 *See, e.g., Zero Motorcycles, Inc. v. Zero Labs Grp., LLC*, 2023 WL 3237505, at *2-
 14 3 (N.D. Cal. May 3, 2023) (denying motion to dismiss federal and state trademark
 15 infringement claims despite plaintiff “not alleg[ing] a single instance of actual
 16 confusion,” and “fail[ing] to plead facts supporting its allegations that Defendant
 17 had a bad faith intent”). In denying the motion to dismiss in *Zero Motorcycles*, the
 18 court explained that the “[a]nalysis of the *Sleekcraft* factors most typically occurs in
 19 the context of a summary judgment motion, or at trial,” and “the party moving to
 20 dismiss faces a significant challenge to show that the non-existence of such a
 21 likelihood can be determined as a matter of law at the pleading stage.” *Id.* at *5; *see also Universal Prot. Serv., LP v. Coastal Fire & Integration Sys., Inc.*, 2023 WL 4042582, at *4 (S.D. Cal. June 15, 2023) (denying motion to dismiss where actual
 24 confusion and bad faith intent were implausible).

25 Defendant asks the Court to consider matters outside the four corners of the
 26 complaint and analyze the content of Defendant’s website for a likelihood of
 27 confusion analysis. Mot. at 6-7. Putting aside that this request is improper,
 28 Defendant’s description of its website is misleading. By Defendant’s own

1 admission, the quoted language and video appear on the homepage:
 2 www.traderjoesunited.org. *Id.* Defendant does not argue—because it cannot—that
 3 the statements or videos located on the homepage appear at the location where the
 4 store offers the goods at issue: store.traderjoesunited.org. Compl. ¶ 4 n.1. Rather,
 5 Defendant argues that “[t]he ‘store’ page requires navigation through the
 6 homepage.” Mot. at 12. But this is false: nothing prevents a user from navigating
 7 directly to the store page or being directed there by a search engine.

8 Defendant’s Motion should be denied because Trader Joe’s has alleged facts
 9 supporting the relevant factors of the *Sleekcraft* test, particularly the “internet
 10 troika.”

11 **b. A Likelihood of Confusion Determination Is Disfavored at the
 12 Motion to Dismiss Stage**

13 Courts in this Circuit routinely hold that it is inappropriate to dismiss a
 14 complaint based on an alleged failure to plead likelihood of confusion. For
 15 example:

- 16 • Arguments for determination of likelihood of confusion are “premature on
 17 a motion to dismiss” and granting dismissal on that basis would be
 18 “highly unusual.” *Dita, Inc. v. Mendez*, 2010 WL 5140855, at *5 (C.D.
 19 Cal. Dec. 14, 2010) (internal citations and quotations omitted);
- 20 • The *Sleekcraft* test is a “fact extensive inquiry [that] is often not
 21 appropriate at the motion to dismiss stage.” *Universal Prot.*, 2023 WL
 22 4042582, at *4;
- 23 • “Many courts have held that the likelihood of consumer confusion is not
 24 appropriate to determine at the motion to dismiss stage.” *RCRV, Inc. v.
 25 Gracing Inc.*, 2016 WL 11000048, at *2 (C.D. Cal. July 20, 2016);
- 26 • “A plaintiff is not required to prove the likelihood of confusion at the
 27 pleading stage.” *Visual Changes*, 2008 WL 4723603, at *4 (internal
 28 citations and quotations omitted));

- 1 • Plaintiff is “not required to prove the likelihood of confusion at the
2 pleading stage.” *Vapor Spot, LLC v. Breathe Vape Spot, Inc.*, 2015 WL
3 12839123, at *5 (C.D. Cal. Sept. 15, 2015) (internal citations and
4 quotations omitted));
5 • “[T]he likelihood of confusion inquiry is a fact-intensive evaluation ill-
6 suited for disposition on a motion to dismiss.” *Lucent Techs.*, 2000 WL
7 1604055, at *2 (15 U.S.C. § 1125(d)(1)(A) claim).

8 In the limited instances where courts in this Circuit have granted a motion to
9 dismiss based on lack of confusion, those cases involved parties who did not sell
10 similar goods and who did not use the entirety of the plaintiff’s trademark. As one
11 court put it:

12 Case law demonstrates that dismissal at the pleadings stage tends to be
13 appropriate when it is clear both that the goods or services in question
14 are not related and that confusion is not likely. *See, e.g., Id.* at
15 861 (affirming district court’s dismissal where “America Speaks”
16 service mark was used by consumer survey group to sell its survey
17 results to business clients and allegedly infringing “America’s Talking”
18 service mark was used by television network that distributed poll
19 results to the news media); *Toho Co., Ltd. v. Sears, Roebuck & Co.*,
20 645 F.2d 788, 790–91 (9th Cir. 1981) (affirming dismissal based on a
21 determination that the use of “BAGZILLA” on garbage bags was
22 unrelated as a matter of law to the use of “GODZILLA” on literary
23 works and toys); *see also Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251
24 F.3d 1252, 1264–65 (9th Cir. 2001) (reversing grant of summary
25 judgment and explaining that the likelihood of confusion presents a
26 question of fact and that “trial courts disfavor deciding trademark
27 cases in summary judgments because the ultimate issue is so
28 inherently factual.... Additionally, the question of likelihood of

1 confusion is routinely submitted for jury determination as a question of
 2 fact” (quoting *Levi Strauss*, 778 F.2d at 1356 n.5 (9th Cir.1985)
 3 (internal citations omitted))).
 4 *RVCA Platform, LLC v. Nudie Jeans Co AB*, 2008 WL 11337820, at *3 (C.D. Cal.
 5 Aug. 29, 2008). But here, Defendant has used the entirety of the mark TRADER
 6 JOE’S and both parties sell, at least, tote bags.

7 Rather than address this in-circuit authority, Defendant directs this Court to
 8 an out-of-circuit district court decision for the proposition that “[l]ikelihood of
 9 confusion is an issue well-suited for screening at the motion to dismiss stage.” Dkt.
 10 No. 23 at 2; *Medieval Times U.S.A., Inc. v. Medieval Times Performers United*,
 11 2023 WL 6307464, at *6 (D.N.J. Sept. 28, 2023). That case cannot overcome the
 12 great weight of in-circuit authority to the contrary. In any event, that case and
 13 Defendant’s other authorities are distinguishable, as discussed below.

14 **c. Defendant’s Authorities Are Unpersuasive Because They Do Not
 15 Involve the Sale of Goods**

16 Defendant’s authorities all fail to support dismissal because none of them
 17 concern *the sale of goods* bearing the plaintiffs’ trademarks; rather, those
 18 authorities concern confusion as to whether the trademark holder sponsored *the
 19 union* or was the source or sponsor of *communications* relating to the union. In
 20 *Medieval Times*, the alleged confusion was that consumers would conclude that the
 21 union was “sponsored or endorsed by plaintiff and that Union membership is
 22 required.” *Medieval Times*, 2023 WL 6307464, at *4. The court concluded that
 23 plaintiff failed to plead allegations to support the theory that defendants’ name
 24 “could lead to the mistaken impression that Defendants are affiliated with or
 25 endorsed by [plaintiff] or that [plaintiffs’] employees are required to become
 26 members of the Union.” *Id.* at *5.

27 Defendant’s other cases are all similar. *International Ass’n of Machinists v.
 28 Winship Green Nursing Center* concerned fliers sent by the employer that used the

1 name of the union, and the alleged confusion was a belief “that the service-marked
 2 campaign literature was produced, sent, or authorized by” the union. 103 F.3d 196,
 3 201 (1st Cir. 1996). In *Silgan*, the activity concerned social media posts and the
 4 alleged confusion was “confusion regarding Silgan’s affiliation, endorsement, or
 5 approval of [the union’s] attempt to unionize its employees.” *Silgan Containers*
 6 *LLC v. Int’l Ass’n of Machinists*, 2018 WL 5840766, at *3 (E.D. Wis. Nov. 8,
 7 2018). In *Cintas*, the union used the employer’s trademark on a website (“Cintas
 8 Exposed”) that criticized the employer, and the employer claimed initial interest
 9 confusion regarding its relationship to that website. *Cintas Corp. v. United Here*,
 10 601 F. Supp. 2d 571, 576 (S.D.N.Y. 2009). And *WHS Entertainment* concerned
 11 fliers distributed by the union that were critical of the employer’s business
 12 practices; the alleged confusion was that the employer sponsored or was affiliated
 13 with those fliers. *WHS Ent. Ventures v. United Paperworkers Int’l Union*, 997 F.
 14 Supp. 946, 948, 951 (M.D. Tenn. 1998).

15 None of these cases has any bearing on the dispute here: the sale by
 16 Defendant of goods bearing Trader Joe’s marks. The motion should be denied.

17 **2. Defendant Misstates the Requirements of an Unfair Competition
 18 Claim**

19 Defendant argues that Trader Joe’s’ common law and statutory UCL claims
 20 must fail because Trader Joe’s did not allege ill-intent or “that Trader Joe’s Union
 21 is a competitor of Trader Joe’s.” Mot. at 9. Defendant misstates the law. In
 22 general, common law unfair competition in California has four elements: (1) the
 23 plaintiff invested substantial time, skill, or money in developing its property; (2) the
 24 defendant appropriated and used the property at little or no cost; (3) the plaintiff did
 25 not authorize or consent to the property’s appropriation and use; and (4) the
 26 plaintiff was injured by the appropriation and use. *City of Carlsbad v. Shah*, 850 F.
 27 Supp. 2d 1087, 1110-11 (S.D. Cal. 2012). But as applied to trademark infringement
 28 claims, the Ninth Circuit “has consistently held that state common law claims of

1 unfair competition and actions pursuant to California [UCL] are ‘substantially
 2 congruent’ to claims made under the Lanham Act” and may be analyzed under the
 3 same legal framework. *Cleary*, 30 F.3d at 1262-63 (internal citations omitted);
 4 *Blumenthal Distrib., Inc. v. Comoch Inc.*, 2023 WL 2356713, at *5 (C.D. Cal. Jan.
 5 24, 2023). As explained above, the test is whether the public is likely to be deceived
 6 or confused by the similarity of the marks, which Trader Joe’s sufficiently pleads in
 7 its complaint. *See* above at 5-7. The law does not require, nor does Defendant cite
 8 to any case suggesting, that ill-intent and a competitor relationship be pled to
 9 support these claims.

10 **3. Trader Joe’s Sufficiently Alleged Defendant’s Use of the
 11 Infringing Mark in Commerce**

12 Contrary to Defendant’s claim, Trader Joe’s pled facts sufficient to allege
 13 Defendant’s use of the TRADER JOE’S Family of Marks in commerce. The term
 14 “use in commerce” means the bona fide use of a mark in the ordinary course of
 15 trade such that a mark is “deemed to be use[d] in commerce” when it is “place[d] in
 16 any manner on [] goods” and “the goods are sold or transported in commerce.” 15
 17 U.S.C. § 1127. The Complaint alleges that “Defendant operates a commercial
 18 website where it markets and sells various products, including apparel, home goods,
 19 and reusable tote bags, for profit”; and “Defendant commenced use of the
 20 TRADER JOE’S Family of Marks in commerce in connection with Defendant’s
 21 commercial website and the merchandise sold thereon in late June 2023.” Compl.
 22 ¶¶ 4, 30. Standing alone, these allegations sufficiently plead use in commerce.

23 Defendant’s primary argument to the contrary is that Trader Joe’s only offers
 24 “repetitive conclusory allegations that Defendant’s website is ‘commercial,’
 25 merchandise is ‘commercial,’ [and] the trademarks are used ‘in a purely
 26 commercial fashion.’” Mot. at 12. But Defendant’s online sale of merchandise
 27 bearing an infringing mark is a textbook example of infringing use in commerce.
 28 *See* 15 U.S.C. § 1127 (use in commerce means “placed on any manner on goods”

1 and “the goods are sold or transported in commerce”). If Defendant’s argument
 2 were accepted, that would mean that Defendant would be free to sell a full range of
 3 counterfeit Trader Joe’s products on its website, because those sales would also not
 4 be “use in commerce.” Defendant’s position defies common sense and is
 5 unsupported by the law. Indeed, a website’s use of a mark constitutes “use in
 6 commerce” for goods when the use “in some way evince[s] that the mark is
 7 ‘associated’ with the goods.” *Marketquest Grp., Inc. v. BIC Corp.*, 316 F. Supp. 3d
 8 1234, 1288 (S.D. Cal. 2018); *see also In re Dell Inc.*, 71 U.S.P.Q. 2d (BNA) 1725,
 9 1727 (T.T.A.B. 2004) (recognizing that “[i]n today’s commercial environment,”
 10 “[w]eb pages which display goods and their trademarks and provide for the on-line
 11 ordering of such goods are, in fact, electronic displays which are associated with the
 12 goods”).

13 At least one court has specifically determined that a union’s adoption of an
 14 employer’s trademark was “use in commerce” in violation of the Lanham Act. *See*
 15 *Brach Van Houten Holding, Inc. v. Save Brach’s Coal. for Chi.*, 856 F. Supp. 472,
 16 475-76 (N.D. Ill. 1994). There, a coalition including the union used the employer’s
 17 logo in communications regarding the union’s efforts to keep a factory open. *Id.* at
 18 474. The defendant argued that this use was not subject to the Lanham Act, because
 19 it did not “sell, distribute, or advertise goods or services.” *Id.* at 475. The court
 20 disagreed and held that the Lanham Act applied, because the defendant was
 21 “soliciting donations, preparing press releases, holding public meetings and press
 22 conferences, propounding proposals for the reorganization of Brach’s ownership
 23 and/or management, and other activities designed to bring about change in Brach’s
 24 organization and enhance the stability of workers’ jobs.” *Id.* The facts regarding use
 25 in commerce are far stronger here, because Defendant has used the TRADER
 26 JOE’S Family of Marks on physical goods that it sells to the public.

27 Defendant cites *Smith v. Wal-Mart Stores, Inc.* for the proposition that
 28 Defendant’s “union organizing shows the material was noncommercial speech” and

1 thus not subject to Trader Joe’s dilution claim. 537 F. Supp. 2d 1302 (N.D. Ga.
 2 2008); Mot. at 13. Nowhere in the complaint does Trader Joe’s allege that
 3 Defendant’s infringing products are related to “union organizing.” In fact, Trader
 4 Joe’s has made the opposite allegation—it has taken no “issue with Defendant’s
 5 reference to Trader Joe’s for the purpose of identifying the union or discussing the
 6 union’s cause.” Compl. ¶ 35. But even if the infringing products were related to
 7 “union organizing,” *Smith* does not hold that such materials are noncommercial
 8 speech. *Smith* concerns parody and nowhere addresses union organizing efforts.

9 **B. The Norris-LaGuardia Act Is Inapplicable Because This Case**
 10 **Does Not Involve a Labor Dispute**

11 Defendant’s reliance on the Norris-LaGuardia Act is misplaced. The Norris-
 12 LaGuardia Act (“NLGA”) prevents courts from issuing injunctions in cases
 13 “involving or growing out of a labor dispute” or which are “contrary to the public
 14 policy declared” within the NLGA. 29 U.S.C. § 101. Because the infringing
 15 conduct Trader Joe’s seeks to enjoin does not meet these criteria, the NLGA is
 16 inapplicable to this action.

17 **1. This Action Is Not a Labor Dispute**

18 This lawsuit is not a labor dispute. The NLGA defines “labor dispute” as
 19 “any controversy concerning terms or conditions of employment, or concerning the
 20 association or representation of persons in negotiating, fixing, maintaining,
 21 changing, or seeking to arrange terms or conditions of employment, regardless of
 22 whether or not the disputants stand in the proximate relation of employer and
 23 employee.” 29 U.S.C. § 113(c). Trader Joe’s brings this action for reasons wholly
 24 unrelated to those described in the NLGA. Specifically, Trader Joe’s seeks only to
 25 prevent Defendant from marketing and selling certain merchandise bearing the
 26 TRADER JOE’S Family of Marks. Compl. ¶ 35. Trader Joe’s makes clear, and
 27 Defendant concedes, that Trader Joe’s does not seek to prevent Defendant from
 28 using the phrase “Trader Joe’s” for the purpose of identifying Trader Joe’s, the

1 union, or in communicating Defendant's messages. *Id.* ¶¶ 35-36; Mot. at 3.

2 Labeling this action a "labor dispute" is simply incorrect.

3 Defendant baselessly asserts that "this case is deeply intertwined with several
 4 concurrent and ongoing labor disputes between the parties within the meaning of
 5 the Norris-LaGuardia Act." Mot. at 15. Absent from the Motion, however, is any
 6 explanation of how enjoining Defendant's sale of a limited category of infringing
 7 merchandise meets the definition of labor dispute under the NLGA. Nor does
 8 Defendant explain how this action has any bearing on the legitimate interests of the
 9 union in any labor dispute. Defendant likewise baselessly asserts that this lawsuit is
 10 "a transparent effort" of "retaliation against the unionization efforts" and "to chill
 11 workers at other Trader Joe's locations from exercising their rights under federal
 12 labor law to organize a union." *Id.* at 3. But Defendant's conclusory allegations fail
 13 to explain how Trader Joe's' requested relief affects Defendant's unionization
 14 efforts or chills workers in any way. Nor do the cases cited by Defendant support its
 15 position.

16 *First*, Defendant erroneously relies on *Marriott Corp. v. Great America Service Trades Council, AFL-CIO*, 552 F.2d 176 (7th Cir. 1976), which Defendant
 17 claims shares a "nearly identical" factual background. Not so. There, plaintiff
 18 Marriott Corporation was constructing an amusement park marketed as "Marriott's
 19 Great America." *Id.* at 178. Several labor organizations joined together for the
 20 purpose of organizing the approximately 1,500 employees expected to be hired by
 21 Marriott and, in doing so, adopted the name, "Great America Service Trades
 22 Counsel, AFL-CIO." *Id.* As part of their organizational efforts, the union ran an
 23 advertisement in a local newspaper addressed to "Applicants for Positions with
 24 Marriott's Great America," and printed authorization cards to distribute to
 25 prospective employees of the amusement park. *Id.* Marriott sued, alleging that the
 26 union's use of the words "Great America" *in its name* violated Marriott's rights
 27 under the Lanham Act on the grounds that the union's "use of 'Great America'"
 28

1 *created a likelihood of confusion that the [union] was affiliated with Marriot and*
 2 *that this conduct caused ‘serious injury to Marriott’s business and reputation.’”* *Id.*
 3 (emphasis added). In finding that the NLGA prevented the requested injunctive
 4 relief, the court explained that Marriott’s relief “was directed against the [union]’s
 5 choice of name,” which was “intertwined with” the “organizational efforts of the
 6 union to achieve representation of Marriott’s workers.” *Id.* at 179.

7 *Marriott* is easily distinguishable from the facts here, because Trader Joe’s
 8 does not seek to enjoin Defendant from using “Trader Joe’s” in its name or any of
 9 its union communications. The *Marriott* plaintiff alleged confusion as to
 10 “affiliation” or “relationship” between *itself and the union*, “not as to source of
 11 products or services.” *Id.* at 180. The opposite is true here. As Defendant concedes,
 12 Trader Joe’s does not demand “that Defendants stop using the phrase ‘Trader Joe’s’
 13 for the purpose of identifying Trader Joe’s or communicating Defendant’s message
 14 or using the phrase ‘Trader Joe’s United’ for the purpose of identifying Defendant
 15 or communicating its message.” Mot. at 15, Compl. ¶ 36. Instead, Trader Joe’s
 16 only seeks to stop Defendant from selling certain products that bear the TRADER
 17 JOE’S Family of Marks. Compl. ¶ 7. Because the concerns expressed in *Marriott*
 18 are not applicable here, Defendant’s reliance on *Marriott* is misplaced.

19 *Second*, Defendant cites *Lucky Stores, Inc. v. International Brotherhood of*
 20 *Teamsters Local Nos. 70, 80, 150, 409*, 812 F. Supp. 162 (N.D. Cal. 1992), for the
 21 proposition that “a boycott [is] inextricably linked with [an] underlying labor
 22 dispute.” Mot. at 14. But this litigation has no similarity to the facts in *Lucky*
 23 *Stores*. There, the “allegedly infringing materials”—printed documents
 24 incorporating the service mark and a parody of plaintiff’s slogan—“were produced
 25 to generate support for Defendants’ boycott efforts” and were distributed in
 26 plaintiff’s store parking lots and entrances. *Lucky*, 812 F. Supp. at 163. Here,
 27 however, (1) there is no boycott and (2) the infringing products are not being used
 28 to generate support for any boycott-like efforts. The reasoning in *Lucky* cannot have

1 any bearing on this case, because the factual circumstances of the claims are
 2 entirely different.

3 *Third*, Defendant directs the Court to *Senco Products, Inc. v. International*
 4 *Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC*, 311 F. Supp. 590,
 5 592 (S.D. Ohio. 1970). There, the union circulated to its employees “handbills or
 6 dodgers” containing plaintiff’s mark. *Id.* at 591. The printed materials were
 7 distributed in connection with a contest to determine whether the union could
 8 qualify in an election as the bargaining representative. *Id.* In determining there was
 9 clearly a labor dispute between the parties, the court stated:

10 [T]he evidence clearly indicates that there is a labor dispute in fact
 11 between parties to this case. ***This is not a case in which the defendant***
 12 ***Union is selling a product or thing or process in the ordinary***
 13 ***commercial sense and using the plaintiff’s name.*** It is a case which
 14 arises in the context, not of competition over commercial matters, but
 15 in a labor dispute.

16 *Id.* at 592 (emphasis added). The court in *Senco* makes the important distinction
 17 between true labor disputes and cases involving the commercial sale of infringing
 18 products—the same distinction this Court should make. In so doing, the *Senco* court
 19 explained: “in a pure ‘commercial case’ a union is, of course, subject to a Lanham
 20 injunction.” *Id.* at 592 n.2. The present action is just such a pure commercial case.
 21 As made clear in the complaint, “Trader Joe’s demand is directed solely at
 22 Defendant’s *commercial use* of Trader Joe’s trademarks on *merchandise sold to*
 23 *consumers on Defendant’s commercial website.*” Compl. ¶ 35 (emphasis added).
 24 *Senco* supports Trader Joe’s position and reflects common sense: as with
 25 Defendant’s argument regarding use in commerce, Defendant’s argument regarding
 26 the NLGA leads to absurd results—that is, under Defendant’s view, the NLGA
 27 permits Defendant to sell any and all goods that it pleases, even those that outright
 28 counterfeit the TRADER JOE’S Family of Marks. This is not the law.

1 **2. Trader Joe's Requested Injunction Is Not Contrary to Public**
2 **Policy**

3 As to the second possibility considered by the NLGA, Defendant does not
4 make any argument that Trader Joe's' requested injunction is contrary to the public
5 policy declared in the NLGA, nor can it. The NLGA describes its public policy
6 concerns as requiring that workers "have full freedom of association" and "shall be
7 free from the interference, restraint, or coercion of employers" in "concerted
8 activities for the purpose of collective bargaining or other mutual aid or protection."
9 29 U.S.C. § 102. As discussed herein, Trader Joe's' requested injunction merely
10 requires Defendant to stop marketing and selling certain merchandise that
11 unlawfully uses the TRADER JOE'S Family of Marks. Defendant offers no
12 explanation of how the commercial sale of the infringing merchandise will affect
13 any of the public policy concerns covered under the NLGA. To ensure clarity on
14 this point, Trader Joe's specified in the complaint that it neither intended to (1) stop
15 Defendant from using "Trader Joe's" to identify the union or to discuss the union's
16 causes, or (2) stop Defendant from selling non-infringing merchandise. Compl. ¶¶
17 36-37.

18 **V. CONCLUSION**

19 For the foregoing reasons, Trader Joe's respectfully requests that the Court
20 deny in its entirety Defendant's Motion to Dismiss, or in the alternative, grant leave
21 for Trader Joe's to amend its complaint.
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14 **CERTIFICATE OF COMPLIANCE**

15 The undersigned, counsel of record for Trade Joe's Company, certifies that
16 this brief contains 6,080 words, which complies with the word limit of L.R. 11-6.1.

17 By: /s/ David R Eberhart

18 David R. Eberhart
19 October 19, 2023